Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: CNC OLC

Introduction

The tenant applied for an order to cancel a One Month Notice to End Tenancy for Cause (the "Notice") pursuant to section 47(4) of the *Residential Tenancy Act* ("Act"). In addition, they applied for an order pursuant to section 62(3) of the Act.

Both parties, including an assistant for the landlord, an advocate for the tenant, and a witness for the tenant, attended the hearing on November 19, 2021.

No service issues were raised, the parties (other than the legal advocate) were affirmed, and Rule 6.11 of the *Rules of Procedure* was explained.

Issues

1. Is the tenant entitled to an order cancelling the Notice?
2. If not, are the landlords entitled to an order of possession?
3. Is the tenant entitled to an order under section 62(3) of the Act?

Background and Evidence

Relevant evidence, complying with the *Rules of Procedure,* was carefully considered in reaching this decision. Only relevant oral and documentary evidence needed to resolve the specific issues of this dispute, and to explain the decision, is reproduced below.

The tenancy in this dispute began January 2018, though a revised tenancy agreement was entered into in October 2018. Monthly rent is $1,385.00 and the tenant paid both security and pet damage deposits. A copy of the written tenancy agreement was in evidence.

On October 7, 2021, the landlord served the Notice on the tenant by way of Canada Post registered mail. It was delivered on October 15 and picked up on October 18.

A copy of the Notice was submitted into evidence. Page two of the Notice indicates three reasons why the landlord issued the Notice: (1) the tenant or a person permitted on the property by the tenant has significantly interfered with or unreasonably disturbed another occupant or the landlord; (2) the tenant or a person permitted on the property by the tenant has put the landlord's property at significant risk; and (3) the tenant has assigned or sublet the rental unit without landlord's written consent.

In the "Details of Causes(s)" (sic) section of the Notice, the landlord stated the following:

> Tenant has sublet the rental unit without permission - tenant has returned to Ontario since end of August 2021 to today (Oct 7th), and has not advised owners/landlords of persons residing there despite agreeing to provide it.
>
> Tenant has history of operating Airbnb/short term/hotel like rentals from rental unit despite;
> 1. being refused permission to do so (emails dated December 2019 and January 2020)
> 2. being advised offering such short term rentals voided owners residential insurance policy and endangered other tenants and their belongings
> 3. COVID-19 Health Restrictions that were in place since Spring 2020, and
> 4. verbal statement to Owners/Landlords' rep that she had stopped offering short term rentals as of January 19, 2021
>
> A history of false statements and actions that show she is a risk to the property and other tenants.

In her testimony, the landlord stated that the tenant has created a significant risk "for the entirety of the tenancy." Moreover, the tenant has assigned or sublet the rental unit for a duration of time. The landlord testified that the tenant has been renting out the rental unit as a commercial enterprise from 2019 until 2021. This, despite being told that she is not permitted to operate a business because it compromised the landlord's residential insurance. The landlord argued that this enterprise has put the rental unit at significant risk. She also argued that the rentals occurred during the pandemic.

As for the sublet, the landlord argued that the tenant's roommate was there for two months while the tenant was out of province. The roommate presumably had exclusive use of the property and therefore there existed a sublet. Moreover, the landlord argued that simply because the tenant had previously referred to her roommate as a "friend," this specific use of the word does not negate the fact that the tenant was subletting.

The landlord reiterated that she has never given the tenant permission to sublet. She reiterated that there is a risk and continues to be a risk with the arrangement, and that there are safety concerns, including something having to do with a blocked fire exit.

The tenant's advocate noted that while the tenant concedes to have operated an Airbnb, there is nothing in evidence to support the landlord's claim that the landlords' insurance policy is at risk. There is no documentary proof that the insurance is voidable. And *that* is the only significant risk for which the landlords have argued, the advocate submitted.

In respect of the subletting itself, the arrangement is that the tenant has a roommate. A roommate living arrangement is not the same as a sublet for the purposes of the Act, the advocate argued. As for the period of absence, the tenant was only absent for about three weeks. Under direct examination she testified that she was only gone from the end of August until September 27, 2021.

The roommate testified as a witness for the tenant. She testified that it was a roommate arrangement, and that she considers this a short-term situation.

As for the rental unit, the tenant explained that it is the main space in an older home. She and her roommate live in the upper suite, which has its own entrance and is completely separate from the downstairs suite. The rental unit consists of two bedrooms, a kitchen, a dining room, a living room, and one bathroom.

Both parties then started talking about mold issues. However, as this was not relevant to the matter before me (at least, not as it relates to the reasons for issuing the Notice), the parties' testimony on this matter was curtailed and it will not be reproduced herein.

Analysis

Where a tenant applies to dispute a notice to end a tenancy, the onus is on the landlord to prove, on a balance of probabilities, the grounds on which the Notice is based.

Here, the landlords issued the Notice under sections 47(1)(d)(i) ("significantly interfered with or unreasonably disturbed another occupant or the landlord of the residential property"), 47(1)(d)(iii) ("put the landlord's property at significant risk"), and 47(1)(i) ("the tenant purports to assign the tenancy agreement or sublet the rental unit without first obtaining the landlord's written consent as required by section 34") of the Act.

As for the first two grounds, there is no evidence before me to be persuaded, on a balance of probabilities, that the tenant has either significantly interfered with or unreasonably disturbed another occupant or the landlord. Moreover, there is no evidence persuading me to find that the tenant has somehow put the property at significant risk. While the landlord spoke of an issue with their residential insurance being compromised due to the tenant's actions, no documentary evidence to support this assertion. There is no documentary evidence to support the claim that the tenant's previous decision to offer Airbnb rentals put the property at significant risk. (The warning from the municipal bylaw office does not, I find, constitute any sort of significant risk.)

In summary, taking into careful consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlords have not met the onus of proving the first two grounds on which they issued the Notice.

In respect of the third ground, namely that the tenant sublet or assigned the tenancy without the landlords' written consent, it is worth noting that section 34(1) of the Act states that "Unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit." This prohibition is usually reflected in written tenancy agreements, though a full and complete copy of the written tenancy agreement in this tenancy was not submitted by either party.

The words "assign" and "sublet" are not defined in the Act. For this, we must turn to *Residential Tenancy Policy Guideline 19. Assignment and Sublet,* (December 2017).

Assignment is defined in the policy guideline as "the act of permanently transferring a tenant's rights under a tenancy agreement to a third party, who becomes the new tenant of the original landlord." In this dispute, there is no evidence before me to find that the tenant in any way permanent transferred her rights under the tenancy agreement to a third party, and that the third party somehow became a new tenant. The tenant rents out a bedroom to a roommate, who also presumably shares the kitchen, living room, dining room, and bathroom with the tenant. Given these facts, it is my finding that there has been no assignment of the tenancy.

Subletting is explained on page three of the guideline, which reads as follows:

> When a rental unit is sublet, the original tenancy agreement remains in place between the original tenant and the landlord, and the original tenant and the sub-tenant enter into a new agreement (referred to as a sublease agreement). Under

> a sublease agreement, the original tenant transfers their rights under the tenancy agreement to a subtenant. This must be for a period shorter than the term of the original tenant's tenancy agreement and the subtenant must agree to vacate the rental unit on a specific date at the end of sublease agreement term, allowing the original tenant to move back into the rental unit. The original tenant remains the tenant of the original landlord, and, upon moving out of the rental unit granting exclusive occupancy to the sub-tenant, becomes the "landlord" of the sub-tenant.

The key point of note here is that the original tenant physically moves out of the rental unit while the sub-tenant occupies the rental unit exclusively. Again, the evidence before me does not lead me to find that the tenant ever vacated the rental unit such that a sublet was created. As for the tenant's out-of-province absence, whether it was for two months or two days is immaterial: the tenant never moved out of the rental unit. Quite simply, I am not persuaded that the tenant has, or has ever, sublet the rental unit.

Given the above, taking into consideration all the oral testimony and documentary evidence presented before me, and applying the law to the facts, I find on a balance of probabilities that the landlords have not met the onus of proving the third ground for issuing the Notice. That is, they have not proven that the tenant assigned the tenancy agreement or sublet the rental unit without first obtaining the landlords' written consent.

What exists is an occupant/roommate relationship. This is set out in the policy guideline: "the tenant, who has a tenancy agreement with the landlord, remains in the rental unit, and rents out a room or space within the rental unit to a third party." The guideline is also clear (on pages 5 and 6) that a situation where a tenant rents out of a room does not constitute a sublet.

Having found that the landlords have not proven any of the grounds on which the Notice was issued, the Notice is hereby cancelled, and it is of no legal force or effect. The tenancy shall continue until it is ended in accordance with the Act.

As neither the tenant nor her advocate made any submissions or argument in respect of the application for an order under section 62(3) of the Act, this aspect of the application is dismissed without leave to reapply. That having been said, it is noted that much of the evidence submitted under this claim for relief was directly related to the Notice.

Conclusion

The application is granted.

This decision is final and binding, unless otherwise permitted under the Act, and is made on delegated authority under section 9.1(1) of the Act.

Dated: November 22, 2021

Residential Tenancy Branch